Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1310

RUSSELL L. LARSON,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Comes now your Petitioner and respectfully shows the Court pursuant to Rule 23 of the Supreme Court of the United States:

(a) That the following decisions were made herein material to this Petition:

(1) Order refusing disclosure of identity of "tipster" (informant-complainant), October 19, 1978.

(2) Findings of Fact, Conclusions of Law refusing to suppress evidence from

defendant Larson from November 17, 1975 to November 25, 1975, inclusive, dated February 13, 1979.

(3) Order during trial refusing to admit evidence of bad faith prosecution of defendant Larson for publicity and public relations purposes. Trial Transcript, Pp. 681-708.

(4) Decision of United States Court of Appeals for the Eighth Circuit affirming conviction and sentence, filed January 4, 1980 (unreported as of this date).

(5) Order denying rehearing (8th Cir., entered January 28, 1980.

(b) (i) This is a Petition for Certiorari to review the Eighth Circuit Court of Appeals affirming the conviction and sentencing of your Petitioner on a six-count felony indictment: three such counts relate to personal income tax returns (Sec. 7201., I.R.C., Title

26 U.S.C. 7201); the remaining three counts relate to corporate income tax returns (Sec. 7206[1], I.R.C., Title 26 U.S.C. 7206[1], and a sentence of the defendant-Petitioner therefor ". . . as to each count . . . " to "a term of two years. . . Sentences shall run concurrently and not consecutively . . .", entered on January 4, 1980.

(ii) The order denying an en banc rehearing and denying a rehearing, dated January 28, 1980.

(iii) Jurisdiction of this Court to review this judgment by Writ of Certiorari is conferred by 28 U.S.C.A. 1254(1) to-wit: "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree."

(c) The questions presented for review are:

(i) Does the trial court in a criminal tax prosecution for tax evasion and falsely subscribing corporate tax returns abuse its sentencing discretion and/or violate the defendant-Petitioner's constitutional rights by subjectively deciding upon apparent prejudice alone that the defendant had testified falsely during the trial as to material matters and, using that decision as a substantial basis in determining sentence without, at the very least, specifying the alleged perjury and giving the defendant and/or his counsel an opportunity to reply before sentence is imposed?

And, corollary thereto, can the same judge on the same basis lawfully and constitutionally receive and emply a secret probation report in determining sentence without allowing the defendant or his

counsel knowledge of its contents or an opportunity to reply?

(ii) Can the Internal Revenue Service knowingly employ the "civil audit" technique as a subterfuge to avoid constitutional restraints against self- incrimination and illegal search and seizure in a criminal investigation?

(iii) Can secret material evidence, the examination of which is withheld from the defendant, his counsel and the public by the prosecution and the trial judge in a criminal tax prosecution including, but not limited to, the identity of a government informant and complainant (who is obviously a witness) be withheld from the defense unless it is "vital to a fair trial" and when the determination of such "vitality" is not a jury function but a secret a priori function of the trial judge?

(iv) Can the IRS use "publicity value" and "public relations utility" as const-

itutionally permissible selective bases for commencing criminal action under the Internal Revenue Code when the circumstances are such that it is unlikely the matter would have been anything other than a civil issue and the taxpayer has kept detailed records of all transactions and is willing to pay any additional tax properly due on unreported receipts of money?

(d) Constitutional provisions and statutes which the case involves are:

(i) Constitution of the United States, Amendment [IV]

"Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(ii) Constitution of the United States, Amendment [V]:

"Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person by subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(iii) Constitution of the United States, Amendment [VI]

"Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a spee-

dy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

(iv) Section 7201, I.R.C., Title 26, U.S.C. 7201:

"§ 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851."

(v) Section 7206, I.R.C., Title 26, U.S.C. 7206(1):

"§ 7206. Fraud and false statements

Any person who -

(1) Declaration under penalties of perjury. - Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or . . .

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852."

(vi) Sec. 7203, I.R.C., Title 26, U.S.C. 7203:

"§ 7203. Willful failure to file return, supply information or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such re-

turn, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851."

(e) This is a criminal prosecution under the federal Internal Revenue Code as specified (b) (i) supra.

Prior to trial, the Petitioner inter alia moved for pre-trial hearings on suppression of evidence and selective prosecution and asked for dismissal of the indictment because of unconstitutional governmental action contrary to the Fourth, Fifth and Sixth Amendments. (See 8th Cir. Desig. Rec. Doc. No. 5, Nov. 14, 1978; see also Petition Appendix, Pp. A-21-A-58.) A hearing was granted and held on the motion to suppress. (See Pre-Trial Trans., Pp. 1-258; see also Pet. App. Pp. A-21-A-47)

While the motion to suppress was technically granted in part and denied in part, practically, it was denied. (See Order, 8th Cir. Desig. Rec., 1/23/79; Pet. App. Pp. A-47-A-58) The unconstitutional selection motions were denied and no hearing was allowed. (See 8th Cir. Desig. Rec. Order, 1.15.79; also Pet. App. A-59 et seq.) Trial commenced on January 23, 1979.

The jury returned a verdict of guilty to all six counts on January 31, 1979; the Petitioner was sentenced to prison for two years on each count, to run concurrently, on May 3, 1979. (See, Pet. App. Pp. A-18 - A-21)

In some instances, the relevant facts have been suppressed by the trial court's acquiescence in government secrecy, sequestration or refusal to produce material documents or other evidence which reasonably might be favorable to the petitioner or might aid in his defense. (See Appellant's 8th Cir. Brief Addenda B and C) With-

in the perimeters of available and accessible information, the following is what occurred:

Pre-Indictment

The Petitoner, while a theoretical majority stockholder, was a minority voting stockholder and a totally controlled (financially) by General Motors Corporation and its subsidiary, Motors Holding Corporation, president of Polar Chevrolet, Inc., and was paid a comparatively small salary while personally selling and directing the selling of many millions of dollars of General Motors' products. (See Trial Trans., Pp. 729-760; 104-105)

While putting his five children through school and borrowing heavily from the banks, Petitioner reached a point at which he could borrow no more from his bank, was unable to arrange a mortgage to buy General Motors out (the principal owner and financial in-

vestor in Polar) and decided he would have to sell the business. (See Trial Trans., Pp. 722-23; 787-790)

During the time a purchaser was being sought in 1972, 1973 and 1974 (the income tax years involved in this prosecution) the Petitioner openly deposited checks (see, esp., Trial Trans., Pp. 286-7) in his personal account as shown in the government's evidence. THERE WAS ABSOLUTELY NO EVASION OR SURREPTITION BY PETITIONER. This money, while being fully accounted for to the IRS when Petitioner Larson was audited, was not reported on his income tax returns. The Petitioner contended that the monies were advances on his share of the business or, in the case of Vogel, as advertising agency loans. Vogel denied they were loans contending, at various times, that they were rebates, refunds, running "things through", cost of goods sold, routine matters, etc. (See Trial Trans., Pp. 260-340) From the

very first contact with the IRS, the Petitioner agreed to pay whatever tax, if any, was due, but the Government refused, never even bothering to compute the tax prior to commencement of the criminal action. The Petitioner had no accounting training, all accounting, bookkeeping, etc., being done by General Motors and its auditors. (Trial Trans., Pp. 720-780) Vogel admitted he would do anything required so he (Vogel) would not have to pay the tax. (Trial Trans., Pp. 278, 271-272) The Government either made no contention as to what the transactions were or called them, at different times, "kickbacks", later dividends, "embezzlements", thefts or other unlawful income, but in general, was very vague as to what the transactions were. The Government resisted all efforts to make its contention known to the Petitioner. Towards the end of the Government's case, and for the first time, the U. S. prosecutor said, ". . . in this situa-

tion we are contending that the amounts that Russell Larson diverted were dividends of the corporation and, as dividends, they are taxable both to the corporation and to the individual . . ." (Trial Trans., P. 536) The trial judge, in an act of grave partiality to the prosecution, instructed the jury in effect that the transactions were embezzlements and, by implication, told the jury that the Government had proven beyond a reasonable doubt that the Petitioner was an embezzler. (See Trial Trans., Vol. 10, P. 1101)

> "Now let me give you another in-instruction with reference to gross income that you should have as part of this charge. In computing the defendant's income to determine whether a tax was due on it, you should include any embezzled funds or other illegally acquired funds along with those lawfully acquired . . . it makes no difference . . . whether such income was lawfully or unlawfully acquired by the defendant . . ."

There were at least 15 different reasonable explanations as to the nature of

the transactions, none of which the government proved beyond a reasonable doubt. (Trial Trans., P. 653) In fact, the Petitioner was prosecuted by innuendo for a crime he wasn't charged with - embezzlement, convicted of crimes mutually inconsistent, and sentenced without a trial or charge for unknown perjury on the personal prejudice and mental indictment of the trial judge. (Sentencing Trans., P. 5; Pet. App. Pp. A-18 - A-21)

> ". . . I have . . . determined that your testimony . . . contained willful and relevant falsehoods . . . I want the record to reflect . . . that I have taken that determination with reference to your testimony . . . into consideration in arriving at a difficult sentencing judgment . . ."

(See also Pet. App. Pp. A-18 - A-20 for use of "secret" probation report.)

Pre-Audit and Audit

In the Fall of 1974, a disgruntled employee of Polar Chevrolet, who was caught stealing, threatened to turn the Petitioner

into the Internal Revenue Service for criminal prosecution because of his discharge, claiming he had a friend in the IRS who would make certain the Petitioner was charged criminally. The Petitioner paid no attention to the threat. (Pre-Trial Trans., Pp. 233-34) Apparently, that employee, or someone acting on his behalf, had such a personal influence contact, for SOMETIME PRIOR TO FEBRUARY 4, 1975, arrangements were made with the Intelligence Division (Criminal Investigation Division) to criminally investigate the Petitioner. (See Pre-Trial Gov't. Exh. A, Pet. App. Pp. A-21 - A-24) A file was opened (but was sequestered during the entire proceedings herein). The man who it is claimed originally opened the criminal file prior to February 4, 1975 in the intelligence office (Tschida's then group leader Michael Brandes) never testified and the true circumstances of the initial contact remain

secret. Again, prior to Feb. 4, 1975, Agent Tschida interviewed the informant. What else was done - correspondence, interoffice memos, etc., - has been withheld, sequestered or destroyed with the trial court's acquiescence or protective orders. (Pre-Trial Trans., Pp. 1-250; 8th Cir. App. Brief Addenda A and B; Pet. App. Pp. A-21 - A-24) A secret government document (Gov't. Exh. A, Pet. App. Pp. A-21 - A-24) was produced at the suppression hearing showing, among other things, that the files remained in Intelligence at least until an audit was ordered on June 24, 1975; tax returns were ordered and checked. This curious statement is on the bottom of an INTELLIGENCE CRIMINAL INVESTIGATION DOCUMENT, Gov't. Exh. A, Page 1 (Page 2 having been sequestered by the court, see Pre-Trial Trans., Pp. 11-17):

"THE SOURCE REQUESTS THAT HE REMAIN STRICTLY CONFIDENTIAL AND BELIEVES THAT ANY INVESTIGATION WHICH

IS STARTED THROUGH A NORMAL AUDIT WILL NOT PLACE SUSPICION ON HIM AS THE INSTIGATOR." (Emphasis ours)

(See Pet. App. P.A-24)

Throughout the entire proceedings, before and during trial, key government records surrounding this prosecution and the activities of the Intelligence Division and the Audit Division have been withheld from the defense although their materiality to the defense is obvious even to the most confirmed totalitarian bureaucrat. (See 8th Cir. App. Brief Addenda A, B & C)

Contacts, both correspondence and telephone calls, continued between the Intelligence and Audit Divisions although these records have likewise disappeared. (See 8th Cir. App. Brief Addendum list of citations to pre-trial and trial transcripts) and were actually asked for by the defense. The trial court by omission and commission consistently refused to compel their production and otherwise prejudicially aided

the prosecution by this device. (See 8th Cir. App. Brief Addenda A, B & C)

An I.R.S. auditor and his supervisor, obviously acting (in spite of their denials) on the instructions of the Intelligence Division in November of 1975, conducted a four-day charade "cover up" or "bad faith" audit of the corporation and, through fraudulent misrepresentations, trickery and deceit, induced the Petitioner to deliver his bank records and garnered Petitioner's total cooperation. The government thereby staged a phony "routine" civil audit which was, in reality, a criminal investigation. (See Pre-Trial Trans., Pp. 1-250) The Petitioner was informed for the first time the following April that he was under investigation for criminal tax activities. The government's hypocrisy in staging the phony civil audit was emphasized blatantly when it claimed tax collection motivation

but never computed a tax.

At no time in his dealings with the Internal Revenue Service, his bank or his business associates did the Petitioner hide his receipt of the money or its cource. There was no evidence of any nature that the Petitioner was intentionally avoiding taxes other than the simple fact of non-reporting. (See Entire Transcripts, both Pre-Trial and Trial Proceedings)

Sentencing

The Petitioner was sentenced to two years in a federal penitentiary because the trial judge thought he committed perjury during the trial. The trial judge also sentenced on secret information and recommendation from the probation department. At no time was the Petitioner or his counsel informed of what the specific perjury was that the judge believed nor were they allowed to see the probation report. (See Page 16 supra, and Pet. App.

Pp. A-18 - A-21 and Argument infra.)

(h) Argument for Allowance of Writ (See Rule 19)

1. SENTENCING

The sentencing issue is of great importance to all American taxpayers. The application of U. S. v. Grayson, 98 Sup.Ct. 2610, clearly imposes a chilling, if not dictatorial, cloture on our constitutional rights and longstanding traditions of presumption of innocence and judicial fair play. The majority opinion of this Court expressly limited Grayson, supra, to the facts of that case. The application of Grayson, supra, by the trial judge in this case is an unjustified extension of the Grayson, supra, doctrine. The minority opinion in Grayson, supra, warned us of the dangers; now this Court should ameliorate them. The Larson tax convictions are not comparable by any rational analysis to Grayson, supra, and, therefore,

the Eighth Circuit and the trial judge erred. The indefiniteness of the majority opinion in Grayson, supra, has made this a monumental and important question which should be settled.

See Trial Trans., May 3, 1979, at P. 5:

"The Court:. . .

> Recognizing the frailty of human judgment I have, nevertheless, determined that your testimony in connection with the trial of this case in my opinion contained willful and relevant falsehoods. . . I have and do consider that determination . . . I want you to know, and I want the record to reflect so that there is no misunderstanding about it, that I have taken that determination with reference to your testimony in the case into consideration in arriving at a difficult sentencing judgment." (Emphasis ours.)

(Pet. App. Pp. A-20 - A-21) Surely, no rational and fair mind could contend that mere differences of opinion (as to the nature of transactions and what constitutes taxable income) would justify incarceration. So whatever view one takes of U. S. v. Grayson, supra (to-wit: the allowance of

personal opinions of a sentencing judge as to the Petitioner's guilt of another crime with which he has not been charged or convicted to influence sentencing for the crime of which he has been convicted), the Grayson, supra, doctrine is contrary to basic human and constitutional rights. Grayson, supra, must be limited in its application to the individual facts upon which it is based. A determination of perjury by the sentencing judge and its influence on the sentencing on the facts of this case are clear deprivations of the Petitioner's constitutional rights.

The Petitioner was admittedly sentenced to a federal penitentiary for a crime he was not charged with; he was not given a chance to answer the judge's determination; indeed, he was not even informed of what facts constituted the perjury that the trial judge decided he was guilty of; he was not given a trial; and, worst of all,

his accuser, on personal prejudice alone, is the judge constitutionally charged with the obligation of impartiality in trying and sentencing the Petitioner. (See Minority Opinion, U. S. v. Grayson, supra.)

This is a total abrogation of constitutional responsibility by the trial judge and deprivation of the Petitioner's civil rights. At the very least, this issue should be thoroughly briefed and decided by this Court. Furthermore, the Eighth Circuit itself seems to be affirming a conviction for fraud and reputation rather than alleged tax crimes when it says at Page 10 of its opinion (Pet. App. P.A-17):

> ". . . Larson was in the car business for twenty years. He knew the rebate and check diversion schemes were fraudulent . . ."

Additionally, the secrecy of the recommendation of the probation officer as to sentencing deprived the Petitioner and his counsel of a fair opportunity to reply and is also a due process anomaly.

"The Court: (Sentencing Trans., May 3, 1979, P. 3, Lines 14-22)

. . . That recommendation in my court is not disclosed or made known to the defendant or his counsel."

(See Pet. App. Pp. A-19 - A-20)

2. CIVIL AUDIT SUBTERFUGE IN CRIMINAL INVESTIGATIONS BY INTERNAL REVENUE SERVICE TO DEPRIVE PETITIONER OF HIS CONSTITUTIONAL RIGHTS.

In our judgment, the circuit courts are in hopeless confusion on this issue. (See U. S. v. Robson, 477 F. 2d 13 [9th Cir. 1973]; Cohen v. U.S., 405 F.2d 34 [8th Cir. 1968]; U. S. v. Dickerson, 413 F.2d 1111 [7th Cir. 1969]; see also U.S. v. Heffner, 420 F.2d 809 [4th Cir.,1969]) This Court's recent statements that Congress "intended" to "intertwine" civil and criminal prosecutions in the Internal Revenue Code will give rise to further questionable incursions into our taxpaying citizens' constitutional rights by the bureaucracy unless Certiorari is granted.

Organized tax protest groups are growing in number throughout the land. This obvious "bad faith" technique of criminal investigation by the Internal Revenue Service must be scotched before the entire audit process is rendered impotent as a vehicle for federal tax law enforcement. The Eighth Circuit Court's decision in this case stands clearly for the proposition that all taxpayers should claim Fifth Amendment privileges in all audits. Failure to grant Certiorari will further encourage subterfuge on the part of the Internal Revenue Service and effectively arm tax protest groups for a massive Fifth Amendment assault on the audit procedure. Both the private citizens and responsible IRS officials need a clear and decisive determination by this Court. (See also Mathis v. United States, 88 Sup. Ct. 1503)

The Eighth Circuit apparently misapprehends the law and, consequently, believes

that special rights are granted to federal revenue agents in criminal tax investigations and prosecutions and, where federal taxes are involved, the Constitution is somehow suspended. That Court's decision, by implication holds that a Constitution that shields violent criminals from civil rights' deprivation has an unwritten exception for federal criminal tax prosecutions.

The use of trickery and deceit to circumvent constitutional rights has never been condoned in the enforcement of criminal laws. The circuit court misapprehended the factual and legal context of an IRS audit. They overlooked or ignored intentionally the statutory provisions of U.S.C.A. 7203, making it a misdemeanor punishable by $10,000 fine and/or a year in jail for failing to ". . . supply any information . . . " which the IRS requests. In this milieu, trickery or deceit by the

agent or service requires suppression.

The facts of this bizarre manipulation by the IRS in the Larson investigation and prosecution are set forth in our statement of the case, Section (e) supra. (See also, Pet. App. Pp. A-21 - A-47)

The Court states at Page 7 of its opinion:

> ". . . Larson was not subjected to coercion. His argument that he was misled by the characterization of the investigation as civil is unsupported by the evidence . . ."

Quite apart from the facts being distinctly contrary to that assertion, what that court was impliedly stating is:

> ". . . Yes, this was a criminal investigation from the beginning; yes, the IRS used trickery and deceit to deprive Larson of his constitutionally guaranteed civil rights; and, yes, the IRS succeeded - but that's all legal as long as we decide without evidence that the defendant was not misled."

A petitio principii argument comprising a perfect circle. In short, the government itself decides when it will recognize con-

stitutional rights - a Constitution not of laws and rights but of governmental grace only!

3. SEQUESTRATION OF MATERIAL EVIDENCE INCLUDING THE WITHHOLDING OF COMPLAINANT'S (INFORMANT) IDENTITY.

Everytime a governmental agency is given leeway in withholding evidence by the use of the "in camera" conception, serious weakening of our rights to public jury trials in criminal proceedings occurs. Thousands of highly paid, highly educated government attorneys microscopically examine this Court's decision for small openings to increase the power of their agencies or services. The right to confrontation has been eroded to the bizarre level of this case wherein the trial judge and the Eighth Circuit aid the prosecution and the Internal Revenue Service in withholding obviously material evidence. Originally, this Court would not allow any evidence to be withheld

if it was relevant or helpful to the defense. O tempora! O mores! How times and customs have changed. The Eighth Circuit has now taken us to the doctrine of complete secrecy unless the trial judge or the appellate court determines that the evidence is "vital" to the defense. The sorry history of secrecy for expediency need hardly be recounted here. The Eighth Circuit has created an evidentiary Frankenstein by espousing the "vitality" test.

Allowing medieval star chamber secrecy as an anachronism of American tax enforcement is unsupported in fact or law.

The circuit court seriously misapprehended constitutional rights of American citizens when it states at Page 5 of its opinion:

> ". . . A court should not require disclosure of an informant's identity UNLESS THE DISCLOSURE IS VITAL to a fair trial." (Emphasis ours)

(See Pet. App. P. A-9) The clear meaning

of this is that material evidence in a criminal defense can be excluded anytime a federal judge determines it isn't "vital". (The value of significance of material evidence is a fundamental jury function - not a trial judge or appellate court function.)

The effect of the Court's decision, therefore, is to decisively emasculate the Petitioner's civil right to a jury trial, his right to be effectively informed of the nature of the charges, to have compulsory process in aid of defense and, above all, the right to face his real accusers.

When a federal court decides that the government's ". . . need for information outweighs any criminal prejudice . . . " (8th Cir. Decision, Pet. App. P. A-9), it is eliminating constitutionality as a source of right and substitutes "government expediency" as the ultimate power. It is difficult to distinguish such con-

cepts from totalitarian ideology.

When the ultimate issue is whether or not Congress can legislate with impunity against constitutional rights and whether or not the courts can interpret against constitutional rights, the Petitioner should, at the very least, have an opportunity for a full hearing on the issue of secrecy before the highest court of our country.

The Eighth Circuit's decision in this case is obviously contrary to this Court's decision in Roviaro v. U.S., 353 U.S. 53, (1957), (See also, Rosenthal, 11 Hast. L. J. 54 [1959]), and to its own decisions in U.S. v. Barnes, 486 F.2d 776 (8th Cir. 1973) and U.S. v. Gucke, 507 F.2d 820 (8th Cir. 1974).

4. PROSECUTION FOR PUBLICITY PURPOSES.

The Internal Revenue Code, pure and simple, is a tax collecting mechanism. The Internal Revenue Service or administrative

agency expends and has expended billions of dollars collecting taxes. It is not a publicity bureau or public relations agency. An individual citizen has only one fundamental obligation under the Revenue Act: that is to report his income and pay his taxes levied by the Congress.

Constitutionally, there is no authority, either in Congress or its internal revenue agency, that allows for the employment of a criminal tax charge against a sovereign citizen on a selective basis for publicity or public relations purposes. No amount of psuedo-Eastern establishment intellectual sophistication can avoid this truth. See U.S. v. Ojala, 544 F. 2d 940 (8th Cir. 1976) and contrast U. S. v. Berrios, 501 F. 2d 1207 (2nd Cir. 1974) with U. S. v. Swanson, 509 F. 2d 1205 (C.A.Iowa 1975).

The brazen indifference of the Internal Revenue Service and the trial court to this Petitioner's desire to pay is carried to

its absurd extreme by the trial court's refusal to answer the jury's material questions relative to the payment of taxes. See 8th Cir. App. Brief Addendum E, P. A-13:

> "Could Larson file an amended tax return prior to or during an investigation?"

Such indifference to fundamental tax collecting responsibilities will continue unless this Court grants Certiorari to settle this important federal question.

It is factually admitted by the government and by the circuit court by implication that Petitioner Larson was prosecuted for publicity purposes only. Whether or not such a criteria is constitutionally permissible should be defended by the Supreme Court. (See 8th Cir. App. Brief,P.26; see also, Order, 8th Cir. Desig. Rec. Doc. No. 10, 1/15/79; Trial Trans., Pp. 681-708)

SUMMARY CONCLUSION

The application of a long-rejected maxim of the past - the "king (sic, government)

can do no wrong" - to tax investigations and prosecutions is not only anachronistic but it is an undemocratic pretentiousness having no historical or rational basis. Moreover, the concept itself is short-sighted and counter-productive for it provides impetus for massive citizen distrust of the Internal Revenue Service and the federal courts.

Congress has passed a law providing that a citizen who does not cooperate in a civil audit is a criminal. The circuit court holds that one who does not cooperate in a civil audit is testifying against himself in a potential criminal trial and his act of cooperation constitutes a waiver of his constitutional rights against self-incrimination. Such a legal and logical absurdity in practice may end effective IRS enforcement of tax liability through the civil audit method, for tax protest groups would have a substantial legal constitutional

basis for advocating massive noncooperation.

The circuit court has sanctioned sentencing of a sovereign American citizen without even a pretense of constitutional due process for a crime with which he is not charged.

Respectfully submitted,

JAMES MALCOLM WILLIAMS
Attorney for Petitioner
212 West Franklin Avenue
Minneapolis, Minnesota 55404

PETITION APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 79-1385

United States of America, Appellee, v. Russell L. Larson, Appellant.	* * * * * * * * *	Appeal from the United States District Court for the District of Minnesota

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Submitted: November 9, 1979

Filed: January 4, 1980

Before GIBSON, Chief Judge, ROSS and STEPHENSON, Circuit Judges.

GIBSON, Chief Judge.

Russell Larson appeals his conviction pursuant to a jury verdict in the United States District Court for the Dist-

rict of Minnesota[1] finding him guilty on all counts of a six-count indictment. The indictment charged three counts of violating U.S.C. § 7201 (1976)[2] by willfully evading income taxes for the years 1972, 1973, and 1974, and three counts of violating 26 U.S.C. § 7206 (1) (1976)[3] by subscribing to materially false corporate income tax returns for the years 1972, 1973, and 1974. On appeal, Larson challenes numerous rulings of the trial judge, including those relating to a suppression motion, a motion to reveal the identity of an informant, denial of a hearing on the issue of discriminatory prosecution, and various evidentiary matters. Larson also contends that the trial court erred in not finding the willful evasion of income tax charges and the subscribing to materially false corporate return charges to be duplicitous. Finally, Larson appeals the trial judge's refusal to grant either a motion for judgment of acquittal or, in the alternative, a new trial. We affirm.

In February, 1975, an unidentified informant contacted the Intelligence Div-

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[1]The Honorable Donald D. Alsop, United States District Judge, District of Minnesota.

[2]26 U.S.C. § 7201 (1976) provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

[3]26 U.S.C. § 7206(1) (1976) provides:

> Any person who --
>
> (1) Declaration under penalties of perjury. -- Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;
>
> * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

ision of the Internal Revenue Service in St. Paul, Minnesota, concerning a possible income tax evasion scheme at Polar Chevrolet, Inc., in White Bear Lake, Minnesota. The informant alerted an IRS special agent in the Intelligence Division to a scheme whereby Larson, president and majority stockholder of Polar Chevrolet, received kickbacks from advertising fees paid to Rodger Vogel, a local television personality whose production firm did commercials for Polar Chevrolet. The special agent informed his group manager of the tipster's story. The group manager then referred the matter to the Audit Division, pursuant to the customary practice regarding information of that character. The group manager of the Audit Division, in his sole discretion, ordered an examination of the tax liability of Polar Chevrolet. IRS Revenue Agent Gary Koosman was instructed on September 8, 1975, to per-

form a civil audit of the 1972, 1973 and 1974 tax returns of Larson and Polar Chevrolet in order to determine their over-all tax liability. Kossman's only contact with the Intelligence Division during this period was to talk with the special agent, who had spoken with the informant, concerning the content of the informant's information.

On November 17, 1975, Agent Koosman visited Polar Chevrolet to begin his audit of the corporate books. He subsequently met with Larson on November 25, 1975, and questioned Larson regarding payments from Polar Chevrolet to Vogel and payments from Vogel's production firm to Larson. On that same date Koosman determined that Larson's and Polar's returns were potentially fraudulent. On December 19, 1975, Koosman, after speaking with Vogel, referred the case to the Intelligence Division for crim-

inal investigation. Larson was advised of his Miranda rights on April 22, 1976.

The evidence disclosed that Larson, in late 1971, had become engaged in a kickback or rebate scheme with Vogel and his production firm. The procedure utilized was for Vogel to submit two invoices, a correct invoice from his advertising firm to Polar Chevrolet, and another invoice inflating the correct charge. Larson then requested Vogel to write a check to Larson reflecting the difference between the original and the inflated invoice. This scheme continued through February 1974.

The kickback scheme even extended to using blank invoices when no services were involved. Vogel would simply write a check which accompanied an invoice with the term "rebated" written upon it. At trial, Vogel testified, in contravening statements made by Larson to Agent Koosman, that these payments were neither referral fees from Lar-

son nor loans to Larson. Larson also diverted checks made payable to Polar Chevrolet to his own personal account during the period of the rebate scheme. These checks involved payments received from leases of trucks, automotive parts repayments and refunds from an advertising firm.

The kickback scheme plus the check diversions resulted, during the taxable years 1972 through 1974, in the underreporting of Polar Chevrolet's corporate income by $57,434 and Larson's personal income by $44,191. A local certified public accountant prepared the returns involved and testified that they were based on information supplied to him by Larson and Polar Chevrolet. Larson signed both his own and the corporation's returns.

Larson was indicted on August 14, 1978. On October 19, 1978, the trial judge denied Larson's motion to require disclosure of

the identity of the informant. On January 15, 1979, the trial judge granted Larson's motion for a suppression hearing and denied his motion to dismiss the indictment and to hold an evidentiary hearing on the issue of selective prosecution. After the suppression hearing, the trial judge on January 23 ordered suppressed any statements made by Larson or documents obtained from him after November 25, 1975, the date of the meeting between Agent Koosman and Larson, and before April 22, 1966,* when Larson was informed of his Miranda rights. Jury trial commenced on January 23, 1979. On January 31 the jury found Larson guilty on all six counts of the indictment. Larson was sentenced on May 3, 1979, to two years on each count to be served concurrently. (*sic 1976)

Pretrial Motions

Larson contends that the IRS should have been compelled to disclose the identity of the informant who tipped the special agent in the Intelligence Division to Larson's tax evasion scheme. In United States v. Weir, 575 F.2d 668, 673 (8th Cir. 1978), we held that "a court should not require disclosure of an informant's identity unless the disclosure is vital to a fair trial." The privilege against disclosing the identity of an informer balances the public interest in effective law enforcement with the fundamental requirement of fairness to the defendant. United States v. Hurse, 453 F.2d 128, 130 (8th Cir. 1972). Here, the IRS's need for information concerning tax evasion outweighs any claimed prejudice by Larson. We agree with the trial court's finding that the identity of the informant was not relevant or helpful to the defense nor essential to a fair determination of the issues. Roviaro v. United States, 353 U.S. 53 (1957). In part-

icular, we note that the two days of pretrial hearings, during which extensive testimony and documentation were presented, reveal that the identity of the tipster was irrelevant to determining when the investigation began to focus on possible criminal activity by Larson.

Larson next argues that all evidence obtained prior to when he was read his Miranda rights should be suppressed because the civil audit of his taxes was a disguised criminal investigation. Preliminarily, we note that Miranda warnings are not necessary in interviews with IRS agents concerning tax liability when the subject is not in custody, even though the "focus" of the investigation has centered upon the taxpayer. Beckwith v. United States, 425 U.S. 341, 347 (1976). Miranda warnings are not generally required even when the investigating IRS division is one which deals primarily with criminal fraud. Id. at 345.

As noted in Beckwith, 425 U.S. at 348, only when a noncustodial investigation might possibly "be characterized as one where 'the behavior of . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . .'" does this court have a duty to make an independent determination of the ultimate issue of voluntariness. We followed this rationale in United States v. Vanelli, 595 F.2d 402, 406 (8th Cir. 1979) holding: "Statements made by a taxpayer to Internal Revenue agents during the course of a noncustodial interview in a criminal tax investigation are admissible even though the taxpayer was not given the warnings required by Miranda." Larson was not subjected to coercion. His argument that he was misled by the characterization of the investigation as civil is unsupported by the evidence. Our examination of the record fails

to disclose that prior to November 25, 1975, Larson was in any way misled by the IRS or Agent Koosman as to the nature of the investigation of his taxes. The examination and audit of Larson's taxes were essentially civil in nature prior to Agent Koosman's meeting with Larson on the 25th. As a matter of fairness and due process, tips or information volunteered on possible criminal activity should be screened and probed for validity and substance before embarking on a criminal investigation. The trial court did not err in denying the motion to suppress.

Larson also contends that the trial court erred in denying his request for a pretrial evidentiary hearing on discriminatory prosecution. The trial court, in ruling on the motion, found the "record devoid of any evidence sufficient to require a hearing on the issue of discriminatory prosecution." In order to establish

the essential elements of a prima facie case of selective discrimination, Larson must first demonstrate that he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. He made no showing to this effect. Second, Larson must demonstrate that the Government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion or his exercise of his first amendment right to free speech. Again, no relevant showing was made. Larson failed to meet the two-prong test of "intentional and purposeful discrimination" set forth in United States v. Swanson, 509 F.2d 1205, 1208-09(8th Cir. 1975). A hearing is necessary only when the motion alleges sufficient facts to take the question past the frivolous state and raises a reasonable doubt as to the prosecutor's purpose. Uni-

ted States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978). Larson's allegations of selective prosecution were meritless; the trial court did not err in denying a hearing.

Larson filed a pretrial motion to dismiss and a post-trial arrest-of-judgment motion on the basis that one sum of unreported money by Larson cannot give rise to both evasion of personal income charges, 26 U.S.C. §§ 7201, and subscribing to materially false corporate income tax returns charges, 26 U.S.C. §§ 7206(1). Despite a cogent explanation by the trial judge, Larson still fails to understand that the signing of a false corporate return and the evasion of personal income taxes are two distinct crimes. See United States v. Lodwick, 410 F.2d 1202, 1205-06 (8th Cir), cert. denied, 396 U.S. 841 (1969). The rebate scheme involved excessive corporate deductions coupled with additional unrep-

orted personal income to Larson. The diverted checks resulted in income to the corporation which went unreported due to Larson's misappropriation to his own personal accounts, which sum was also not reported in his personal returns. Larson wilfully caused a substantial understatement of Polar's income tax liability and failed to report a substantial share of his personal income.

Discretionary trial rulings

Larson alleges numerous errors by the trial court relating to its manner of dealing with defense objections, rulings on motions, comments made by the court during trial regarding the conduct of the defense, instructions to the jury, the reading of the instructions to the jury, handling the jury deliberations, and the sentencing procedure. We find all of these contentions to be meritless. The trial judge dealt

fairly and judiciously with all of Larson's motions, and displayed admirable patience and restraint when confronted with the plethora of frivolous objections raised by Larson's attorney. The quality of a defense attorney is not related to the quantity of his objections and disruptions. The trial court did not abuse its discretion in its conduct of the trial or sentencing procedure.

Post-trial motions

Larson filed post-trial motions for acquittal and, in the alternative, for a new trial. The trial court denied both, finding that when the evidence is viewed in the light most favorable to the Government, see United States v. Hemphill, 544 F.2d 341, 344 (8th Cir. 1976), cert. denied, 430 U.S. 967 (1977), "[t]he evidence at trial was sufficient for the jury to find beyond a reasonable doubt the defendant

guilty as charged in each count of the indictment." We agree. The evidence clearly established that Larson voluntarily and intentionally evaded personal income tax liability and subscribed to false corporate returns for Polar Chevrolet, Inc. for the years 1972, 1973, and 1974. Larson failed to report roughly half of his income during those years. A consistent pattern of understatement of income may be used to establish the essential inference of wilfulness. United States v. Vanelli, 595 F.2d at 405. Larson, however, went beyond mere nonreporting; he developed both a rebate and check diversion scheme to enhance his own personal income at the expense of both the Government and Polar Chevrolet. Larson was in the car business for twenty years. He knew the rebate and check diversion schemes were fraudulent.

Larson was afforded a fair trial. The

jury's verdict was amply supported by the evidence. The post-trial motions for acquittal and for a new trial were properly denied.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

* * * * * * * * * * * * * * * *

(Transcript of Sentencing in District Court)

(TITLE)

Sentencing in the above-entitled matter came on before the Honorable Donald D. Alsop, one of the Judges of the above Court, at St. Paul, Minnesota, on May 3, 1979, commencing at 9:00 a.m.

* * *

MS. HVASS: . . . A presentence investigation was conducted after the jury trial. A report has been prepared, Mr. Williams, have you had an opportunity to rev-

iew that report?

MR. WILLIAMS: We both read it, Your Honor.

THE COURT: Very well.

MS. HVASS: Is it complete and accurate to the best of your understanding?

MR. WILLIAMS: . . . Frankly, I don't understand precisely what the agent was doing in his report. Generally the report omitted some of the key facts as to the offense and specifically one with reference to the final sales figure and it contained no indication at all as to what the role -- it contained no indication at all as to what the probation was recommending. To me it didn't look like a presentence investigation at all. I didn't know what it was.

. . .

THE COURT: . . .With reference to the recommendation of the probation . . . our practice under Rule 32(c)(2) is that the probation officer does, at least in my court

. . ., submit a second recommendation separate and apart from the report . . . THAT RECOMMENDATION IN MY COURT, IS NOT DISCLOSED OR MADE KNOWN TO THE DEFENDANT OR HIS COUNSEL. (Emphasis ours). . .

Recognizing the frailty of human judgment I have, nevertheless, DETERMINED THAT YOUR TESTIMONY IN CONNECTION WITH THE TRIAL OF THIS CASE IN MY OPINION CONTAINED WILLFUL AND RELEVANT FALSEHOODS. Under the Authority of United States versus Grayson in 98 Supreme Court 2610, I have and do consider that determination together with all other information that I have received on the presentence report as it affects your prospects for rehabilitation and restoration to a useful place in society. (Emphasis ours.)

I want you to know and I want the record to reflect so that there is no misunderstanding about it, that I have taken THAT DETERMINATION WITH REFERENCE TO YOUR TESTIMONY IN THE CASE INTO CONSIDERATION IN ARR-

IVING AT A DIFFICULT SENTENCING JUDGMENT. (Emphasis ours.)

As punishment for the offenses for which you now stand convicted you are committed to the custody of the attorney general as to each count -- to the custody of the attorney general or his authorized representative for imprisonment for a term of two years. These sentences shall run concurrently and not consecutively.

. . .

* * * * * * * * * * * *

SUPPRESSION HEARING
Government's Exhibit A
Intelligence Division
Internal Revenue Service
DOCUMENT

JUN 27 1975
(*U.S.Government Printing Office:1973-502-823)

LARSON, RUSSELL L.
366 Sharon Lane
White Bear Lake, MN

Confidential
Informant

1. Taxpayer's Name and Address/ 2. Origin

3. Social Security Number/4. E.I. Number

5. Communication
☒ Person ☐ Phone ☐ Written

6. Occupation
President, Polar Chevrolet, Inc/

7. Source/DP/ BA/Govt./
/ X / /

8. Aliases, DBA,etc.

9. Received by (name and title)

William C. Tschida, Special Agent I: -

10. Date Received 2-4-75

11. Place Received St.Paul,Minnesota

12. Nature of Tax Income

13. Taxable Periods 1972-1973

14. Form 211 Status
☐ Will be filed ☒ Not Known Date to
☐ Form furnished ☐ Filed I.C.E.-- -

15. Evaluator (/s/) CTF WCT

16. ID Files Search 6/23/75 kj

17. Results of ID Files Search
No Record

18 Case Number Date

19. Other Disposition Information Item

20. Returns Filing Record
Date Searched No record ☐
Years Searched Returns Filed ☐

21. DLN'S

1120 - 41347237612 24 (1972)
1120 - 41347187601 14 (1973)
1040 - 41247279505 22 (1972)
1040 - 41211110120 02 (1973)

Audit/ 6-24-75

Files or other *

Transferred

☐ Insufficient Resources
* ☐ Part D sent to Service Center

Number returns attached:

23. Information Obtained and/or Evaluator Comments

Beginning in the fall of '72, LARSON made an arrangement with KENT PRODUCTIONS to boost up the monthly advertising bill to POLAR CHEVROLET which was in excess of the actual charges. KENT PRODUCTIONS then "kicked back" this excess amount to LARSON via a check deducted on their books as consulting fees.

The average monthly excess is estimated to be $3,000.00 indicating total amount paid in 1972 was $12,000.00 and for 1973 it was $36,000.00. The kickbacks stopped in March or April 1974.

KENT PRODUCTIONS, owned by ROGER VOGEL,aka: ROGER KENT, a local wrestling announcer for WTCN-TV, had pressure put on by LARSON to falsify the billing statements. LARSON indirectly threatened KENT PRODUCTIONS with changing advertising agencies if they did not comply with his wishes.

It is believed that KENT PRODUCTIONS did not benefit from this scheme other than to re-

tain POLAR CHEVROLET as its largest customer.

The source of this information believes that LARSON may have reported the additional income on his returns, but the corporate books and returns show the overstated billings as a direct expense.

The source requests that he remain strictly confidential and believes that any investigation which is started through a normal audit it will not place suspicion on him as the initiator.

* * * * * * * * * * * *

Extracts from Transcript - Hearing on Suppression Motion, January 18, 1979 before the Trial Court.

(P. 8, Lines 1-24; Direct examination of Mr. Tschida by Ms. Hvass)

Q: How did the information item that you took in February of 1975 originate?

A. From a person, a phone call.

Q. What information were you given in that phone call concerning Russell Larson or Polar Chevrolet

A. I really wasn't given any information in the phone call. A phone call was received by my supervisor at that time who requested that I call this person.

Q. Did you call that person?

A. Yes, I did. I didn't receive any information at that time, I made an appointment to meet with that person.

Q. Did you subsequently meet with the individual who furnished the information item?

A. Yes, I did.

Q. What took place in that meeting?

A. At that meeting this person supplied me with certain information.

Q. What information were you given?

A. I was given information that there was a scheme between Polar Chevrolet, a corporation, and an advertising agency where this advertising agency sent inflated bills to the corporation which the corporation would pay and then the excess was kicked back to Mr. Russell Larson who was the president of

the corporation.

* * *

(P. 27, lines 22-25; cross-examination of Mr. Tschida by Mr. Williams)

Q. Is there a record that would show specifically at what time the initial contact was made, what information was taken, and the decision that was made?

A. There is no record.

* * *

(P. 30, lines 4-21; cross-examination of Mr. Tschida by Mr. Williams)

Q. Now could you have gone to your - do your records show when Mr. Vogel, also known as Roger Kent was contacted?

A. Do my records -- my records would show that, yes.

Q. And was he contacted back in February of '75?

A. Not by me.

Q. By somebody else?

A. I don't know.

Q. Well, you are an investigator, the man

said that Kent Productions was involved in this kickback scheme, it would be a simple matter for you to have gone out to Kent Productions and determined whether or not there was any truth in this allegation back in February of 1975, wouldn't it have been?

A. It would have been easy to determine.

Q. It would have been a simple matter for you to have gone to Mr. Roger Vogel of Kent Productions to determine whether or not there was any truth in these allegations?

A. It would have been a simple matter, yes.

* * *

(P. 31, Line 21 - P. 32, line 4; cross-examination of Mr. Tschida by Mr. Williams)

Q. So we are clear on this then, the matter remained in the Intelligence Division subject to the Intelligence Division's control from February 4 of 1975 to June 23 of 1975, is that correct?

A. I don't know where the location of that item was during that time.

* * *

(P. 38, Lines 12-21; cross-examination of Mr. Tschida by Mr. Williams)

Q. We have already established that you could have done two simple things to have verified the informant's information back at that time in February of 1975, namely you could have checked the books and records of Kent Productions and Roger Vogel, as president and owner; and you would have checked the corporate records of Polar Chevrolet, correct?

A. I could have done that.

Q. Yes, a very simple matter, maybe a couple of hours?

A. I suppose I could have done that.

* * *

(P. 39, Line 25 - P. 40, Line 7; cross-examination of Mr. Tschida by Mr. Williams)

Q. Okay. But as an experienced investigator you knew that by doing this, the three things I delineated, checking the tax returns, checking Polar Chevrolet's records and

checking Kent Productions, you could determine whether or not a crime had been committed?

A. I could determine --

Q. With some reasonable likelihood that a crime had or had not been committed?

A. If I would have taken those tests, probably.

* * *

(P. 44, Line 23-P. 45, Line 12; recross examination of Mr. Tschida by Mr. Williams)

Q. Sir, when you had this meeting with your informant, you and he entered into an agreement with reference to protecting his identity, didn't you?

A. An agreement?

Q. You agreed that you would protect his identity and you have so instructed the United States attorney and she has been doing, to the best of her ability, that; trying to keep his name away from both myself and my client and up until today, the Court?

A. I think I told that person that I would

not disclose his name.

Q. Well, you went one step further, didn't you? You agreed that you would initiate a routine audit as a device to investigation [gate] this criminal allegation?

A. I don't think I ever agreed to that with him.

* * *

The following extracts from transcript of hearing on suppression motion, January 18, 1979 before the Trial Court are from cross-examination of "Civil Audit" Revenue Agent Koosman by Mr. Williams:

(P. 82, Line 14 - P. 84, Line 8)

Q. My question to you is that you knew before you did anything on this that you were in fact carrying out an investigation on behalf of the Intelligence Division because they were too busy to do it themselves?

A. No.

Q. You didn't know that?

A. We wouldn't carry out an investigation for Intelligence Division.

Q. Was this case brought to you by your group leader, Steinmetz?

A. He gave me the case to audit.

Q. And when he brought it over to you he told you that this had been referred down by Tschida, didn't he, from the Intelligence Division?

A. It was on the document.

Q. And he told you that Tschida had interviewed the informant?

A. I didn't know if he interviewed him or not.

Q. Well, didn't you testify before when you were on the stand that you had routine correspondence with Tschida during the course of your handling of it?

A. I just talked to Bill Tschida once to verify.

Q. I thought you said you had correspondence with Tschida.

A. To verify the document, if everything was included on there.

Q. All right. I see what you are saying,

but you understand that you were aiding Tschida?

A. No.

Q. As a matter of fact you called Tschida up, you and your group manager called Tschida up to make sure you carried out in conformity with his wishes, didn't you?

A. No.

Q. You asked him for additional information?

A. Yes.

Q. So you knew right from the very beginning that you went into Polar Chevrolet for purposes of verifying the information from the informant for purposes of instituting criminal prosecution, you knew that, didn't you, Mr. Koosman?

A. Wouldn't have had to be criminal.

Q. But if the allegations of the informant were substantiated it was for purposes of instituting a criminal investigation, right?

A. Not at my level.

Q. But you knew that, you knew you were

aiding Tschida?

A. Ultimately it could have.

* * *

(P. 85, Lines 5-7)

Q. You spent almost three and a half days on the corporate records, didn't you?

A. Four and a half.

* * *

(P. 85, Lines 17-20)

Q. It just took you a couple of hours after you completed that corporate audit to finish with the audit of Mr. Larson, isn't that right?

A. That is right, to make a determination.

* * *

(P. 86, Lines 4-8)

Q. I understand that, but you are not telling the Court under oath that it usually takes, only takes you two hours to audit somebody who is president of a corporation and so on, it takes you usually more than two hours, doesn't it?

A. Oh, yeah.

* * *

(P. 89, Lines 10-13)

Q. Now you knew at that time, did you not, that by your silence and the way you expressed yourself to Mr. Larson that he would assume that you were just doing a routine audit?

A. I suppose.

* * *

(P. 90, Line 1 - P. 91, Line 2)

Q. What you really were trying to find out is whether or not Vogel had been paid a substantial amount of money by the corporation, that was basically what you were there for?

A. Basically.

Q. And yet you spent four days to find that little simple truth out and you are telling me under oath that you didn't feel that you were misrepresenting your function?

A. I was looking at other things.

Q. Any by your silence practicing fraud on a citizen of the United States?

A. No.

Q. You didn't feel that way?

A. No.

Q. Then when you went into his office, when you had completed the audit of the corporate records, you said to him, did you not, "Mr. Larson, I want to audit your tax returns"?

A. Yes.

Q. And again you knew at that time that you were aiding for the purposes of criminal prosecution, didn't you?

A. No.

Q. You didn't even compute his tax due, sir?

A. There was no need to.

Q. That is right because you weren't auditing for computation of tax, you were auditing him on behalf of the Intelligence Division?

MS. HVASS: Objection, argumentative.

THE COURT: Sustained.

* * *

(P. 92, Line 19 - P. 93, Line 22)

Q. When you went into his office after you had spent four days to find out whether Vogel had or had not issued some -- had sold

some radio time, this was also done, this four days was done so that you would further mislead Mr. Larson into believing you were doing a routine civil audit, wasn't that true?

A. No.

Q. And/you went into his office didn't he ask you, "Why are you auditing me?"

when

Do you recall him asking you that?

A. No, I don't.

Q. Do you deny he asked you that?

A. No.

Q. And didn't he say to you that, "I have been audited before and they have never audited my returns before"?

A. No.

Q. And didn't you say it is routine to audit the president's returns when we audit the corporate returns?

A. I wouldn't have said that.

Q. You did say it, didn't you?

A. I don't remember.

Q. You did everything you could by word

and deed and not saying things to make Mr. Larson believe that you were just there doing a routine audit, isn't that right?

A. If you say so.

THE COURT: I am not sure that is right, Mr. Kossman, the fact that either counsel say anything does not make it right.

THE WITNESS: I would say no.

THE COURT: All right.

* * *

(P. 53, Lines 9-20; direct examination of Mr. Koosman by Ms. Hvass)

THE COURT: Well, I am looking at Rule 1004 and trying to find out whether or not the original is lost or has been destroyed. Are you telling me that the original, or that this document that you say was the referral document that brought the case to your attention has been destroyed or you just don't know where it is?

THE WITNESS: I don't know where it is.

THE COURT: Do you know where it might be?

THE WITNESS: When it leaves, I close the case after making both the civil -- or my civil investigation, the correspondence, with Mr. Tschida's investigation, I sent my report into our review staff along with --

* * *

The following extracts from transcript of hearing on suppression motion, January 18, 1979 before the Trial Court are from direct examination of Koosman's "Civil Audit" Supervisor Steinmetz:

(P. 112, Lines 1-7) By Ms. Hvass:

Q. Were you present in court on Thursday when Mr. Koosmann testified?

A. Yes.

Q. Did you hear him testify at the time that you suggested that he contact Mr. Tschida after you assigned the case to him for audit?

A. Yes.

* * *

(P. 114, Lines 8-10) By Ms. Hvass:

Q. Did you accompany Mr. Kossman on his first visit to the corporation?

A. Yes, I did.

* * *

(P. 128, Lines 9-22) Cross-examination by Mr. Williams:

Q. I see. May Isee the documents that you received from the Intelligence Division when you first heard from Mr. Larson in August of 1975?

A. This would be it.

Q. That is all, that came in a plain unmarked envelope?

A. This is it. This is all there was.

THE COURT: When you say this you are referring to what?

THE WITNESS: The single information item.

THE COURT: Tell me what number it is. I want to know the court number. You are referring to "this" and I want to know -- I want the record to reflect that you are referring to Government Exhibit A.

All right, go ahead.

* * *

The following extracts from transcript of

hearing on suppression motion, January 18, 1979 before the Trial Court are from Tschida's supervisor Fisher:

(P. 178, Lines 9-16) By Ms. Hvass:

Q. What option did you choose with respect to this information item referring to Polar Chevrolet and Mr. Larson?

A. I determined this should be sent to the Audit Division for their evaluation.

Q. Was that solely your decision or did you consult with anyone else in making that decision?

A. I discussed the item with Mr. Tschida but the decision was my own.

* * *

(P. 181, Lines 7-20) By Ms. Hvass:

Q. When if at all was a criminal case opened on either Russell Larson or Polar Chevrolet?

A. A criminal case was opened on Russell Larson. I cannot tell you the exact date now without having, you know, there is a controlling document that would open that

case. I don't have it here and I don't know where it would be. I can't tell you the exact date, I don't know.

Q. When was a criminal case opened on this matter in reference to the referral back from the Audit Division?

A. The criminal case on the matter was opened after we received the referral from Revenue Agent Koosman and it would be sometime subsequent to the date of his referral on the bottom of his referral, probably two or three weeks later.

* * *

(P. 186, Lines 5-13) By Mr. Williams on cross-examination:

Q: Let's just say that period of time from February of 1975 up to the conclusion of Mr. Tschida's investigation which apparently you didn't bring your file with you either, is that correct?

A. No, I don't maintain a file. We do have a file in the Criminal Investigation Division on the case.

Q. That is what I am talking about. You didn't bring that file with you?

A. Nobody asked me to.

* * *

(P. 213, Line 17 - P. 214, Line 12) By Mr. Williams:

Q. So that at least - what was the date of that?

A. The date is May 5, 1975.

Q. Okay. So then activity in the Intelligence Division of the United States Bureau of Internal Revenue, from the 4th day of February at least until that date, was an active file in the Intelligence Division?

A. We wouldn't use that terminology, I guess my answer would be no.

Q. Now, sir, I am not sure I got that straight and I want to be careful. You say you have no control over the decisions made by Mr. Kossman and Mr. Steinmetz?

A. Absolutely correct.

Q. Now what do you mean by that? Do you mean you would be burned at the stake like

Joan of Arc if you made a deal with them to handle this case for you? What do you mean when you say you have no authority?

A. I am instructed as a special agent not to discuss audits, civil audits or instruct revenue agents or anybody in the Audit as to how to proceed on a civil audit.

Q. Because you might taint the evidence?

A. Correct.

* * *

(P. 215, Lines 15-21) By Mr. Williams on cross-examination:

Q. I inferred from your answer that you gave the United States attorney that you did not refer the case, when it came back, to Tschida, because he had done the investigation on it initially?

A. That would not be the main reason, no.

Q. Was it a reason?

A. It might be a conclusion but it wouldn't be the reason.

* * *

The following extracts from transcript of hearing on suppression motion, January 18,

1979 before the Trial Court are from direct examination of Russell L. Larson, defendant:

(P. 238, Line 20 - P. 240, Line 19(By Mr. Williams:

Q. Did he (sic, Koosman) at any time in response to those questions indicate to you that he was there for any other purpose than to do a routine civil audit of Polar Chevrolet records?

A. Never.

Q. What happened next?

A. This went on for three or four days, and Mr. Koosmann started asking me, he asked me -- we met on the show floor --

Q. On the what?

A. The show floor where new cars are displayed and he asked to see my personal returns and I asked Mr. Koosmann, I said, you know, that is rather strange, why do you want my personal returns. Well, he said, it is part of our routine when we audit a corporation to audit the personal records of the president of the corporation. Then

I said that is strange to me because I have never been asked for my personal returns before.

Q. Were you satisfied with what Mr. Kossmann told you, that this was a new requirement of the Bureau of Internal Revenue?

A. Absolutely. I had nothing to hide.

Q. Did he by word or deed either directly or indirectly by what he said or didn't say, what he did or didn't do, indicate to you that this was anything other than a part of the routine civil audit of the Polar Chevrolet records?

A. Never.

Q. What happened next?

A. Well, on the first occasion that he asked me I did not have those records in the dealership which I normally did, but I had them in a box at home because, for whatever reason they were, and then after he asked me two or three different occasions, I brought them down and the first two -- it wasn't

that I wasn't cooperating, I just in fact forgot to bring them.

So then I brought the records, giving him everything that was there.

Q. You didn't during this period up until the time you actually gave him the record(s), did you at any time have any sense of for(e) boding or anything come to your mind from what you had done before that made you think you might be charged with any sort of a crime or fraud against the government?

A. Never.

Q. Had you had any feeling of any nature that you were under investigation or might be charged with a crime as a result of this, would you have produced these documents without consulting an attorney?

A. No. I would have called Mr. Grinner.

Q. If you had known that the initial audit of Polar Chevrolet was being conducted as part of an attempt to determine whether or not you were guilty of fraud, would you

have consulted an attorney and made use of all of your civil rights?

A. Absolutely.

* * * * * * * * * * * *

(TITLE)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

. . . This matter comes before the court on the motion of the defendant to dismiss the indictment and to suppress certain evidence. This matter has been fully briefed by both parties, and an evidentiary hearing was conducted on January 18 and 22,1979. Testimony was taken from agents of the Internal Revenue Service (William Tschida, Gary Koosmann, Robert Steinmetz, and C. Thomas Fisher) and the defendant Russell Larson.

Pursuant to this court's order of January 23, 1979, the court makes the following:

FINDINGS OF FACT

1. On or about February 4, 1975 an unidentified informant telephoned the Intell-

igence Division of the Internal Revenue Service in St. Paul, Minnesota with an allegation of potential tax evasion of Polar Chevrolet, Inc.

2. At the direction of Group Manager Michael Brandes, IRS Special Agent William Tschida of the Intelligence Division met with the informant and was told of a scheme between Polar Chevrolet, Inc. and Kent Productions, an advertising agency, whereby inflated bills were submitted to Polar by Kent Productions with a kickback going to Russell L. Larson, president of Polar Chevrolet, Inc.

3. The information derived by Agent Tschida is reflected in the Information Item marked as Government's Exhibit A.

4. Agent Tschida, with the approval of Group Manager Brandes, subsequently requested from Ogden, Utah the 1972 and 1973 tax returns of Polar Chevrolet, Inc., and Russell L. Larson. Those returns were de-

livered by June 9, 1975.

5. Group Manager C. Thomas Fisher of the Intelligence Division inspected the tax returns and made the decision to assign the information to the Audit Division of the Internal Revenue Service. He determined that there was insufficient corroboration of the reliability and credibility of the informant to open a criminal case.

6. Agent Fisher's decision to assign the information to the Audit Division was independent, was in accordance with the policy procedures in effect at that date (Gov. Exhs. H and I), and was not the result of any agreement between the informant and any agent of the Internal Revenue Service.

7. The Information Item (Gov. Exh. B) and tax returns were routinely set out for review by the Audit Division screener to decide whether there was audit potential.

7. The documents were next reviewed by the Classification Specialist who ass-

igned them to Group Manager Robert Steinmetz of the Audit Division.

9. Agent Steinmetz made the final decision to initiate an audit because of the specificity of the tax evasion allegation and its possible effect on tax liability.

10. Agent Steinmetz's decision was made independently and without consulting anyone in the Intelligence Division.

11. On or about September 8, 1975, Agent Steinmetz assigned the Polar Chevrolet, Inc. audit to Revenue Agent Gary Koosmann to conduct an examination to determine the overall tax liability as in any routine audit.

12. Agent Koosman was given no special instructions with respect to the audit. Agent Steinmetz did suggest that he contact Agent Tschida to determine whether he had all the information known at that point in time.

13. Agent Koosmann conducted the aud-

it under the supervision of Agent Steinmetz; at no time was either revenue agent acting under the supervision of or instructions from anyone in the Intelligence Division.

14. On November 17, 1975 Agent Koosmann visited Polar Chevrolet, Inc. by prearranged appointment to review the corporate books and records. With the assistance of Paul Anderson, the Bookkeeper, he spent November 17, 18, 19, and 24 reviewing the general journals, general ledgers, purchase journals, sales journals, adjusting entries and records at Polar Chevrolet, Inc.

15. At some time during his initial visit to Polar Chevrolet, Inc., Agent Koosmann was introduced to the defendant Russell L. Larson.

16. At no time did Agent Koosmann tell Mr. Larson that he was investigating a possible criminal tax charge. By Agent Koosmann's conduct, he led Mr. Larson to believe that he was conducting a routine

audit.

17. On November 25, 1975 Agent Koosmann extended his investigation to Mr. Larson's personal tax returns. At that time he requested from Mr. Larson, and was furnished, Mr. Larson's bank statements and deposit tickets.

18. Agent Koosmann questioned Mr. Larson about payments Mr. Larson had received from Kent Productions, the advertising agency. Mr. Larson stated that the payments were referral fees and that if he owed any additional taxes, he would pay them.

19. Agent Koosmann concluded his audit of Mr. Larson's personal income taxes on November 25, 1975. On that same date, the following conclusion of the audit, he made a determination that fraud was indicated with respect to Mr. Larson's personal income taxes.

20. On December 9, 1975 Agent Koosmann returned to Polar Chevrolet, Inc. and

met with Mr. Larson to conclude the audit of the corporation. He had no intention of discussing Mr. Larson's individual tax returns at that time.

21. At the December 9, 1975 meeting, Mr. Larson initiated a discussion of his personal income taxes and gave Agent Koosmann a different interpretation of the payments he had received from Kent Productions; namely, that the payments were loans.

22. Agent Koosmann determined that under the December 9, 1975 interpretation of the payments from Kent Productions, the payments would not be income to Mr. Larson and there would be no indications of fraud.

23. On December 16, 1975 Agent Koosmann met with Mr. Roger Vogel of Kent Productions to discuss the payments received by Mr. Larson. This conversation confirmed Agent Koosmann's earlier determination of fraud with respect to Mr. Larson's personal income taxes.

24. On December 19, 1975 Agent Koosmann referred Mr. Larson's personal income tax case to the Intelligence Division as a potential fraud case (Gov. Exh. C). The referral was based on Agent Koosmann's examination of Mr. Larson's records and his conversations with Mr. Larson.

25. Agent Koosmann never referred the Polar Chevrolet, Inc. corporate taxes to the Intelligence Division for fraud investigation.

26. Mr. Larson's personal income tax case was assigned to Agent Tschida of the Intelligence Division for fraud investigation in the ordinary course of assignment of such cases.

27. On April 22, 1976 Agents Tschida and Koosmann interviewed Mr. Larson with respect to his personal income taxes. At that meeting, Mr. Larson was for the first time advised that the agents were then con-

ducting an investigation of possible criminal violations and was informed of his Fifth Amendment rights.

CONCLUSIONS OF LAW

The issue presented by defendant's motion is at what point in time the investigation by the IRS became criminal in nature, requiring that the defendant be informed of his constitutional rights. United States v. Robson, 477 F. 2d 13 (9th Cir. 1973); United States v. Dickerson, 413 F. 2d 1111 (7th Cir. 1969). The defendant claims that the IRS intended to seek criminal sanctions from the outset and that the civil audit was merely a guise to enable the IRS to obtain the information it desired without alerting Mr. Larson to the potential of criminal liability.

This claim finds no support in the evidence as adduced at the hearing on this matter. It appears that the initial tip from the informant was routinely taken by the

Intelligence Division and was routinely referred to the Audit Division. There is no evidence in the record to support defendant's claim that the investigation was criminal in nature from its inception.

It appears to the court that the critical date in the course of the IRS investigation was November 25, 1975. On that date, Agent Koosmann determined that fraud was indicated with respect to the personal income tax returns. It was at this time that the investigation was no longer a routine civil audit solely to determine potential tax liability.

Once Agent Koosmann made the determination that fraud was indicated, any further investigation of Mr. Larson's personal income taxes became criminal in nature, and Mr. Larson was entitled to be so informed and to be advised of his constitutional rights. This procedure was properly followed by Agents Tschida and Koosmann on April

22, 1976.

Between the date of Agent Koosmann's fraud determination (November 25, 1975) and the date Mr. Larson was advised of the criminal potential (April 22, 1976), Agent Koosmann had one final meeting with Mr. Larson on December 9, 1975 to close up the corporate audit. At that meeting Agent Koosmann did not raise the subject of Mr. Larson's personal income taxes, nor did he advise Mr. Larson of the criminal potential therein.

It is the holding of this court that once a fraud indication determination has been made by an agent of the IRS, the IRS may engage in no further contacts with the taxpayer unless the taxpayer is informed of the criminal potential and advised of his constitutional rights. This holding includes contacts with the taxpayer with respect to the tax liability of a tax-paying entity other than the taxpayer himself.

Thus, once the fraud indication determination is made with respect to the taxpayer's personal income taxes, the IRS may not engage in any further contact with the taxpayer with respect to the taxpayer's personal income taxes or with respect to any other tax-paying entity's income taxes without informing and advising the taxpayer of his potential personal liability.

As applied in the instant case, this holding compels suppression of any statements made by or documents obtained from Russell Larson after November 25, 1975 and before April 22, 1976 as evidence obtained by the IRS without informing and advising Mr. Larson of his situation.

DATED: February 13, 1979.

/s/Donald D. Alsop
Donald D. Alsop
United States District
Judge

* * * * * * * * * * *

(TITLE OF CAUSE)

ORDER

. . . Further, the defendant seeks the identity of a so-called "tipster". The court is satisfied that the disclosure of the identity of this "tipster" or "informant" would not be helpful to the defense of the accused or to a fair determination of the case. Obviously no claim can be made that the "tipster" was a participant in the crime alleged.

The court accepts the report and recommendation of the Magistrate that the motion for disclosure of the identity of the "tipster" or "informant" be denied and the defendant's motion in that regard will be denied.

. . .

Dated: October 19, 1978.

/s/Donald D. Alsop
United States District
Judge

* * * * * * * * * * *

(TITLE OF CAUSE) ORDER

. . . The record is devoid of any evidence sufficient to require a hearing on the issue of discriminatory prosecution.

The Magistrate has recommended that the motion for an order dismissing the indictment be dismissed and that the motion for an order compelling an evidentiary hearing on the issue of whether or not the prosecution of the defendant was selective and discriminatory be denied. The court adopts and accepts the Magistrate's recommendations thereon with the exception of the evidentiary hearing noted above, and upon it own de novo review of the matter, motions with respect to the indictment and discriminatory prosecution will be denied.

. . .

IT IS FURTHER ORDERED That the defendant's motion for an evidentiary hearing on whether or not the prosecution was selective and discriminatory be and the same here-

by is in all things denied.

. . .

DATED: January 12, 1979.

/s/Donald D. Alsop
United States District
Judge

* * * * * * * * * * *

(TITLE OF CAUSE) ORDER

. . .

IT IS ORDERED That the motion of the defendant to dismiss the indictment be and hereby is denied in all respects.

. . .

DATED: January 23,1979.

/s/Donald D. Alsop
United States District
Judge

Supreme Court, U. S.
FILED
APR 11 1980
MICHAEL RODAK, JR., CLERK

No. 79-1310

In the Supreme Court of the United States

OCTOBER TERM, 1979

RUSSELL L. LARSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-18) is reported at 612 F. 2d 1301.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1980. A petition for rehearing was denied on January 28, 1980. The petition for a writ of certiorari was filed on February 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in refusing to require the government to reveal the identity of a confidential informant.

2. Whether the district court correctly found that a civil audit by the Internal Revenue Service was not a subterfuge designed to mislead petitioner into cooperating with the government in a criminal investigation.

3. Whether the district court correctly found that petitioner failed to present evidence showing that he was selected for prosecution upon a constitutionally impermissible basis.

4. Whether the district court erred in imposing sentence by considering petitioner's commission of perjury at trial.

5. Whether the district court erred in withholding from petitioner the sentence recommendation contained in the presentence report.

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on three counts of willfully evading income taxes for the years 1972, 1973, and 1974, in violation of 26 U.S.C. 7201, and on three counts of subscribing to materially false corporate income tax returns for the same years, in violation of 26 U.S.C. 7206(1). The district court sentenced petitioner to concurrent two-year prison terms on each count. The court of appeals affirmed (Pet. App. A-1 to A-18).

1. Prior to trial, petitioner moved for disclosure of the identity of a confidential government informant, moved to dismiss the indictment on grounds of selective prosecution, and moved to suppress certain statements and evidence. The district court denied petitioner's motion to disclose the identity of the informant and also declined to hold an evidentiary hearing on the issue of selective

prosecution. However, the district court granted petitioner's motion for a hearing on his claim that he had been deceived into divulging certain evidence by representations of IRS agents that their investigation of his activities was wholly civil in nature.

The evidence adduced at the suppression hearing showed that in February 1975 an unidentified informant contacted the Intelligence Division of the Internal Revenue Service concerning a possible income tax evasion scheme at Polar Chevrolet, Inc. Petitioner was majority stockholder and president of that company. The Intelligence Division referred the matter to the Audit Division pursuant to customary agency procedures (Pet. App. A-3 to A-5). In September 1975, the case was assigned to Agent Gary Koosman to perform a civil audit of the 1972, 1973 and 1974 tax returns of petitioner and Polar Chevrolet. Koosman's only contact with the Intelligence Division during this period was a conversation with the special agent who had spoken with the informant concerning the substance of the informant's tip. On November 25, 1975, Koosman determined that petitioner's and Polar's tax returns were potentially fraudulent. He then referred the case to the Intelligence Division for criminal investigation. Petitioner was advised of the criminal nature of the investigation and of his *Miranda* rights on April 22, 1976 (Pet. App. A-5 to A-6).

After the suppression hearing, the district court suppressed all statements and documents obtained from petitioner after November 25, 1975 (when Agent Koosman determined the tax returns were potentially fraudulent) and before April 22, 1976 (when petitioner was informed of his *Miranda* rights) (Pet. App. A-6, A-8).

2. The evidence at trial disclosed that, beginning in 1971 and continuing through 1974, petitioner engaged in a kickback scheme along with Rodger Vogel, an advertising executive who provided services to Polar Chevrolet. Vogel submitted two invoices for advertising services rendered to Polar, one invoice reflecting the actual charge and another reflecting an inflated charge. The higher invoice was paid by Polar. Vogel then wrote a check to petitioner representing the difference between the two invoices. Petitioner received these amounts as unreported personal income and reported the false inflated charges as business expenses on Polar's corporate tax returns. During this period, petitioner also diverted to his personal use various checks made payable to Polar Chevrolet for truck leases, automotive parts repayments and refunds (Pet. App. A-4, A-6 to A-7).

The kickback and check diversion scheme resulted, during taxable years 1972 through 1974, in underreporting of Polar Chevrolet's corporate income by $57,434 and underreporting of petitioner's personal income by $44,191 (Pet. App. A-7).

ARGUMENT

1. Petitioner contends (Pet. 30-33) that he was prejudiced by the government's refusal to disclose the identity of its confidential informant. However, as both courts below correctly found (Pet. App. A-9 to A-10), the identity of the informant was not relevant to petitioner's defense at trial. Petitioner's interest in learning the identity of the informant did not outweigh the interest of the government in preserving the confidentiality of the informant's identity. See *Roviaro* v. *United States*, 353 U.S. 53, 62 (1957). See also *McCray* v. *Illinois*, 386 U.S. 300 (1967).

The informant here involved simply communicated his belief that a kickback scheme had occurred at Polar Chevrolet. Petitioner did not claim that the tipster was a participant in the crime or that he knew facts about the crime that were unknown to the defense. Under these circumstances, the identity of the informant need not be divulged. See, *e.g.*, *United States* v. *Alonzo*, 571 F. 2d 1384, 1387 (5th Cir.), cert. denied, 439 U.S. 847 (1978); *Simpson* v. *Kreiger*, 565 F. 2d 390, 391-392 (6th Cir. 1977), cert. denied, 435 U.S. 946 (1978); *United States* v. *Russ*, 362 F. 2d 843 (2d Cir.), cert. denied, 385 U.S. 923 (1966).

The crime charged against petitioner was proven by the testimony of witnesses who were known to petitioner and who were extensively cross-examined by his counsel at trial. Under these circumstances, withholding the identity of the informant could not have prejudiced petitioner, and the district court did not abuse its discretion in denying the disclosure motion.[1]

2. Petitioner also argues (Pet. 26-30) that the civil audit was a subterfuge and that a criminal investigation was being conducted by the Internal Revenue Service from the beginning. On this basis, he contends that he was misled by the investigating agents and that his statements and the documents he produced should have been suppressed.

---

[1]The cases cited by petitioner do not support his contrary contention. In *United States* v. *Gocke*, 507 F. 2d 820, 826 (8th Cir. 1974), the court recognized that the identity of a mere tipster need not be divulged. In *United States* v. *Barnes*, 486 F. 2d 776 (8th Cir. 1973), in contrast, the court required disclosure of the identity of an informant who possessed material information essential to the defense.

However, as both courts below specifically found, the audit in question was a civil audit at least until November 25, 1975, when the investigating agent determined that there was a possibility of a criminal violation (Pet. App. A-11 to A-12).

Tips received from informants are initially evaluated by the Intelligence Division of the Internal Revenue Service (Suppression Hearing Tr. 174). Such tips are ordinarily transmitted to the Audit Division for a civil audit. If the civil audit discloses evidence of fraud, the case is referred back to the Intelligence Division and a criminal investigation is commenced (*id.* at 172-174). This procedure has been approved repeatedly by the lower courts. See, *e.g.*, *Truitt* v. *Lenahan*, 529 F. 2d 230 (6th Cir.), cert. denied, 427 U.S. 912 (1976); *United States* v. *Leonard*, 524 F. 2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976); *United States* v. *Davis*, 424 F. 2d 1241 (5th Cir.), cert. denied, 400 U.S. 821 (1970); *United States* v. *McCorkle*, 511 F. 2d 482, 487-489 (7th Cir.), cert. denied, 423 U.S. 826 (1975); *United States* v. *Robson*, 477 F. 2d 13 (9th Cir. 1973).

Petitioner has cited nothing in the record that supports his assertion that the civil investigation was conducted in bad faith or was a subterfuge. The uncontroverted testimony of Agent Koosman revealed that he was not acting under the direction of the Intelligence Division, but rather was performing a standard audit under the supervision of the Audit Division (Suppression Hearing Tr. 82, 86-88, 109, 137, 182). As soon as Agent Koosman's investigation led him to suspect fraud, the case was turned over to the Intelligence Division (*id.* at 74-75, 97, 121). At

his first interview with the special agent from the Intelligence Division, petitioner was warned of the criminal aspect of the investigation and was notified of his *Miranda* rights (Suppression Hearing Tr. 22-23).

3. Petitioner also contends (Pet. 33-35) that the indictment should have been dismissed because the prosecution was discriminatory and was instituted only to generate publicity. This contention was properly rejected by both courts below.

Considerable discretion is vested in the government in deciding which cases to prosecute, and that discretion will be reviewed only on a prima facie showing that the prosecution is invidious or discriminatory. *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978). Petitioner was required to show (1) that he had been singled out for prosecution when other similarly situated violators had not been prosecuted and (2) that this selection was based on impermissible considerations such as race or religion. See *Oyler* v. *Boles*, *supra*; *United States* v. *Berrios*, 501 F. 2d 1207, 1211 (2d Cir. 1974); *United States* v. *Ojala*, 544 F. 2d 940, 943 (8th Cir. 1976); *United States* v. *Swanson*, 509 F. 2d 1205, 1209 (8th Cir. 1975).

Petitioner was allowed to make an offer of proof on this question (Tr. 681-708), but he failed to make the requisite showing. No evidence was presented suggesting that other persons similarly situated were not prosecuted. Moreover, petitioner made no showing that this prosecution was instituted for publicity purposes. (We note that even if such a showing had been made, publicity and its deterrent value are not impermissible considerations in

initiating a prosecution. See *United States* v. *Oaks*, 527 F. 2d 937, 939-940 (9th Cir. 1975), cert. denied, 426 U.S. 952 (1976); *United States* v. *Gillings*, 568 F. 2d 1307, 1309 (9th Cir.), cert. denied, 436 U.S. 919 (1978); *United States* v. *Catlett*, 584 F. 2d 864, 868 (8th Cir. 1978).) Under these circumstances, there was no need for a further hearing on the issue of discriminatory prosecution.

4. Petitioner claims finally that the sentencing procedure followed by the district court was improper. First, he asserts (Pet. 22-25) that the trial judge acted improperly in taking into account his belief that petitioner perjured himself at trial. However, this consideration was approved by the Court in *United States* v. *Grayson*, 438 U.S. 41 (1978). Contrary to petitioner's contention, he was not sentenced to jail for perjury. The trial judge simply took into account the veracity of his testimony as one factor relevant to his prospects for rehabilitation. See *United States* v. *Grayson*, *supra*, 438 U.S. at 55.

Second, petitioner asserts (Pet. 25-26) that his sentence was invalid because he was not permitted to inspect the presentence recommendation of the United States Probation Service. However, Fed. R. Crim. P. 32(c)(3)(A) provides that "[b]efore imposing sentence the court shall upon request permit the defendant * * * to read the report of the presentence investigation exclusive of any recommendation as to sentence * * *." Here, the presentence report itself was disclosed to petitioner. He was thus free to contest any factual matter considered by the trial judge in sentencing. Only the recommendation as to sentence was withheld (Sentencing Hearing Tr. 2-4). The trial judge's refusal to disclose that recommendation was consistent with the express terms of Rule 32(c)(3)(A).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys

APRIL 1980